



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL SUIT NO. 27 OF 2018

ABDULRAHMAN MOHAMED MWINZAGU.....PLAINTIFF/RESPONDENT

VERSUS

ALI MOHAMED MWINZAGU.....DEFENDANT/APPLICANT

RULING

1. Abdulrahman Mohamed Mwinzagu, the Plaintiff/Respondent, filed the Originating Summons (the OS) herein dated 16.8.18, seeking that he and one Salim Mohamed Suleiman be appointed trustees of the Wakf of one Bi Kichanga Binti Mwinyi Mkuu (the deceased) over Plot Nos. 161/VI/MN (Plot 161) and Mombasa Block XXVI/120 (Plot 120). He also sought an order that Ali Mohamed Mwinzagu, the Defendant/Applicant is not a lawful trustee of the said Wakf or in the alternative, that the Defendant/Applicant be removed as a trustee of the Wakf and that the Respondent provide a statement of affairs and accounts of Plot 161 from October 2015 to date.

2. By an application dated 18.1.19, the Defendant/Applicant sought temporary orders restraining the Plaintiff/Respondent from selling, alienating and dealing with the suit properties. He also sought temporary orders restraining the Plaintiff/Respondent from demolishing, renovating or developing the house built by the Defendant/Applicant on the suit properties or collecting rent therefrom. The grounds contained in the Defendant/Applicant's affidavit sworn on 18.1.19 are that he is the administrator of the estate of the deceased having been so appointed on 5.8.09; that the suit properties belong to the estate of the deceased; that the Plaintiff/Respondent abandoned the suit properties since 1975 and the same were wasting away and the house thereon caved in. The Defendant/Applicant accused the Plaintiff/Respondent and others of removing his belongings from the house he built thereon and have been collecting rent therefrom. He further accused the Plaintiff/Respondent of intending to sell the suit properties.

3. The Plaintiff/Respondent in his replying affidavit sworn on 19.2.19 denied the allegations by the Defendant/Applicant. He averred that Plot 161 has always been developed and was being administered by the Defendant/Applicant and their late cousin Said Ali Rashid. He further stated that the house on Plot 120 has always been the family house of the beneficiaries of the Wakf. All beneficiaries are entitled to collect rent from the suit properties. It is only in 2018 that the Defendant/Applicant began to lay claim on the properties. As regards the grant of representation, the Plaintiff/Respondent accused the Defendant/Applicant of seeking to deprive the other beneficiaries of their inheritance by obtaining the grant fraudulently and listing himself as the only beneficiary of the deceased. He further accused the Defendant/Applicant of only listing Plot 161 in his application for the grant. The Plaintiff/Respondent also accused the Defendant/Applicant of selling part of the Wakf properties. He prayed that the Application be dismissed with costs as it seeks to determine the OS at interlocutory stage.

4. I have given due consideration to the written submissions filed by the parties. The issue for determination in the Application is whether the Defendant/Applicant established a case for the grant of interlocutory injunction pending the hearing and determination of the suit.

5. The principles governing the grant of interlocutory injunction as set out in the case of *Giella –vs- Cassman Brown* [1973] EA 358 are well settled:

“The conditions for a grant of an interlocutory injunction are now I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.”

6. First, the Plaintiff must establish that he has a prima facie case with a probability of success. Second, the Plaintiff must establish that if the order of injunction is not granted, he is likely to suffer irreparable harm that would not adequately be compensated by an award of damages. Third, in the event that the Court shall be in doubt, it shall determine the case on a balance of convenience.

7. Has the Defendant/Applicant established a prima facie case with a probability of success? He alleges that the Plaintiff/Respondent intends to sell the properties. This is however denied by the Plaintiff/Respondent. I note that no proof of the alleged sale was availed to the

Court. Further, the Defendant/Applicant claimed that he built the house standing on the suit premises, an allegation denied by the Plaintiff/Respondent. It is a well-established rule of evidence that he who alleges must prove. Section 107 of the Evidence Act provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

8. The onus of proving that the Respondent/Applicant built the house on the suit properties and that the Plaintiff/Respondent intended to sell the same, lay squarely with the Respondent/Applicant. He however failed to discharge the burden placed upon him by law.

9. The purpose of any interlocutory orders is to preserve the *status quo* pending the hearing and determination of the suit. Order 40 Rule 1 of the Civil Procedure Rules provides for cases in which temporary injunction may be granted:

1. Cases in which temporary injunction may be granted

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

10. As indicated herein, no evidence of sale of the suit properties herein has been placed before the Court. This notwithstanding, it is necessary to preserve the properties pending the hearing and determination of the suit herein.

11. In the case of Margaret Njeri Muiruri (Being the Administrator of the Estate of Joseph Muiruri (Deceased)) v Bank of Baroda (Kenya) Ltd [2001] eKLR cited by the Defendant/Applicant, the Court stated:

Besides disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.

12. The Court notes that disputes over land are emotive and monetary compensation is rarely adequate compensation where loss occurs. However, as indicated earlier, there is no evidence that the Plaintiff/Respondent intends to sell the house on the suit properties. Further as to whether the Defendant/Applicant will suffer irreparable loss if the orders are not granted, this can only be determined upon settling the question as to whether he built the house on the properties as claimed. Being in doubt, I am required to decide the application on the balance of convenience.

13. The Defendant/Applicant claims that he is the sole administrator of the estate of the deceased and his application for confirmation of grant is pending. He seeks that the Plaintiff/Respondent be restrained from collecting the rent from the house on the properties, as this amounts to intermeddling of the estate. His claim that he built the house is highly contested by the Plaintiff/Respondent who stated that the house never caved in but was renovated and that generations of the beneficiaries of the Wakf have always resided in the house. The Plaintiff/Respondent further stated that the proceeds of rent are used for repairs and maintenance of the house, as well as payment of land rates. This was not controverted by the Defendant/Applicant. The Defendant/Applicant submitted that he stands to suffer more than the Plaintiff/Respondent, if the orders sought are not granted.

14. It is noteworthy that the injunction against the Plaintiff/Respondent is not sought with a view to preserve the estate of the deceased, but to protect the Defendant/Applicant's own interest. Also worthy of note is that while the Defendant/Applicant has accused the Plaintiff/Respondent of abandoning the suit properties since 1975, he too abandoned the process of administration of the estate of the deceased. Whereas he obtained the grant on 5.8.09, it was not until 10 years later, on 18.1.19, that he filed the summons for confirmation of grant. Interestingly, this was 4 months after the OS was filed. Section 71 of the Law of Succession Act provides that a holder of a grant of representation shall after the expiry of 6 months from the date of the grant, apply for the confirmation thereof. Under Section 76 of the same Act, failure to apply for confirmation of a grant within 1 year of the date thereof, is a ground for revocation of the same. It would appear to the Court therefore, that the Defendant/Applicant is guilty of the very neglect of the estate, that he is accusing the Plaintiff/Respondent of.

15. Regarding which way the balance of convenience tilts, I am guided by the finding in *Ojwang, J. (as he then was) in Amir Suleiman v Amboseli Resort Limited [2004] eKLR* who cited Justice Hoffmann who stated in the English case of *Films Rover International, ([1986] 3 All ER 772, at pp 780 – 781)*

“A fundamental principle is....that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’.....”

Ojwang J, (as he then was) did himself opine in the said case:

“Lastly there would be a much larger risk of injustice if I found in favour of the defendant, than if I determined this application in favour of the applicant”.

16. If the Plaintiff/Respondent is restrained from collecting the rent, the tenant will not pay the rent, as there will be no one to pay the same to. The likelihood of never recovering such uncollected rent is real. The risk of further wastage of the property will be larger if the Court were to find in favour of the Defendant/Applicant, than if this application were determined in favour of the Plaintiff/Respondent. The balance of convenience, in my view, tilts in favour of maintaining the status quo as far as collection of rent is concerned.

17. The Defendant/Applicant has also asked that the OCS be directed to provide security and/or any other assistance to ensure compliance of any orders to be issued herein. My view is that the circumstances of the case do not require the intervention of law enforcement officers. In any event, I am doubtful that there exists any entity known as **“OCS Mombasa”**.

18. In the circumstances, I make the following orders, which shall remain in place pending the hearing and determination of the suit herein:

- i) The Plaintiff/Respondent by himself, his employees, or persons acting under his directions are hereby restrained from selling, alienating and dealing with Plots Nos. 161/VI/MN (Plot 161) and Mombasa Block XXVI/120 (Plot 120) in any manner that might render restitution impossible.
- ii) Status quo regarding collection of rent, shall be maintained.
- iii) Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 19th day of June, 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Defendant/Applicant**

..... **for the Plaintiff/Respondent**

..... **Court Assistant**